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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EVANSTON INSURANCE CO., an Illinois corporation; MARKEL SHAND, INC., an Illinois corporation;, Plaintiffs, vs. BYRON & EDWARDS, APC; BYRON EDWARDS MOSTOFI, APC; MICHAEL M. EDWARDS, ESQ.; an individual; THOMAS W. BYRON, ESQ.; an individual; and DOES 1-50, inclusive,, Defendants.	CASE NO. 08 CV 407 BTM LSP **ANSWER OF DEFENDANTS BYRON & EDWARDS, APC, BYRON EDWARDS MOSTOFI, APC, AND MICHAEL M. EDWARDS TO COMPLAINT FOR LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTY** **DEMAND FOR JURY TRIAL**

Defendants BYRON & EDWARDS, APC ("B&E), BYRON EDWARDS MOSTOFI, APC ("BEM"), and MICHAEL M. EDWARDS ("EDWARDS") (hereinafter collectively "Defendants"), hereby respond to Plaintiffs' Complaint for Legal Malpractice and Breach of Fiduciary Duty as follows:

THE PARTIES

1. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 1 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

2. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 2 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

3. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 3 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

4. Defendants admit the allegations contained in Paragraph 4 of Plaintiffs' Complaint.

5. Defendants deny that BEM is a law firm and a California Professional Corporation authorized to transact business in the State of California, with its principal place of business in San Diego, California. Defendants admit that BEM was at all times relevant a law firm and a California Professional Corporation authorized to transact business in the State of California, with its principal place of business in San Diego, California.

6. Defendants admit the allegations contained in Paragraph 6 of Plaintiffs' Complaint.

7. Defendants admit the allegations contained in Paragraph 7 of Plaintiffs' Complaint.

8. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 8 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

9. Defendants admit that at all relevant times herein, Defendants EDWARDS and BYRON were the agent, representative, and/or employee of Defendants BEM or B&E, and that at all times they were each acting within the course, purpose and scope of their agency, representation, and/or employment. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 9 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

JURISDICTION and VENUE

10. Defendants admit that Defendants EDWARDS and BYRON are citizens of California and that Defendant B&E is a professional corporation whose principal places of business is in California. Defendants deny that Defendant BEM is a professional corporation whose principal place of business is in California. Defendants are without sufficient knowledge or

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information to either admit or deny the remaining allegations contained in Paragraph 10 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

11. Defendants admit that on or about April 1, 2005, Evanston Insurance Company ("EVANSTON") issued an Architects and Engineers Professional Liability policy, No. AE-809633, ("Policy") to Summit Consulting & Architecture. Defendants admit that the Policy stated that the coverage afforded was "limited to liability for those Claims that are first made against the insured during the Policy Period or the Extended Reporting Period, if exercised." Defendants admit that the Policy provided a retroactive date of April 1, 2001. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 11 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

12. Defendants admit that on or about May 18, 2004, Joanne Rogers ("Rogers") filed a Complaint in the Superior Court of the State of California for the County of San Diego, entitled *Joanne Rogers v. Watermark Owners Association, et al.*, bearing Case No. GIC830102 ("Rogers Action"). Defendants admit that on or about December 20, 2005, Rogers filed a First Amended Complaint ("FAC") adding Summit Consulting & Architecture, Inc. ("Summit") as a named defendant, and that on or about April 12, 2006, Rogers filed a Second Amended Complaint ("SAC") in which Summit remained a Defendant. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 12 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

13. Defendants admit that on or about January 16, 2006, Michael Kiss ("Kiss") caused the defense of the FAC in the Rogers Action to be tendered to EVANSTON, on behalf of Summit and Kiss (collectively the "Insureds"), requesting that EVANSTON provide all the benefits and coverage to which the Insureds were entitled pursuant to the terms of the Policy. Defendants admit that EDWARDS was a co-shareholder, employee and agent of BEM when EDWARDS was retained by Markel Shand, Inc. (formerly Shand Moraham & Company) ("SHAND"), to provide coverage advice and counsel as to whether there was any potential for coverage to be provided to

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the Insureds for the FAC pursuant to the terms and provisions of the Policy. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 13 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

14. Defendants admit that EDWARDS' co-shareholder, BYRON, who was an employee and agent of BEM, was attorney of record and representing The Szaras Companies, Inc. ("Szaras"), a defendant in the Rogers Action. Defendants deny the allegation that because Szaras was a defendant in the Rogers Action, Szaras' interests actually conflicted with the interests of the Insureds. Defendants deny the allegation that because Szaras was a defendant in the Rogers Action, Szaras' interests actually conflicted with PLAINTIFFS' interests in determining whether there was coverage owed to the Insureds for the Rogers Action under the terms of the Policy. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 14 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

15. Defendants admit that, at all times relevant hereto, BYRON and EDWARDS were co-shareholders, and that BYRON and EDWARDS were agents and employees of BEM or B&E. Defendants admit that EDWARDS was retained by SHAND to provide legal counsel and advice to PLAINTIFFS. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 15 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

16. Defendants deny that EDWARDS, BYRON, BEM and B&E understood and accepted that they were jointly and collectively retained to represent PLAINTIFFS. Defendants admit that at all relevant times EDWARDS performed his duties on behalf of PLAINTIFFS in the course and scope of his retention as PLAINTIFFS' counsel. Defendants deny that BYRON owed any duties to PLAINTIFFS. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 16 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

17. Defendants deny the allegations contained in Paragraph 17 of Plaintiffs' Complaint.

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18. Defendants deny the allegations contained in Paragraph 18 of Plaintiffs' Complaint.

19. Defendants deny that they violated CRPC Rule 3-310 or any ethical, professional or fiduciary responsibilities. Defendants deny that they had any obligation to provide written disclosure of any alleged relationship with Szaras. Defendants deny the allegation that Szaras interests actually and/or potentially conflicted with PLAINTIFFS' interests or the interests of the Insureds. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 19 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

20. Defendants admit that on or about February 9, 2006, EDWARDS provided SHAND with a written coverage opinion in which he concluded, in part, that "based on the allegations made in [the Rogers Action] … there is no potentially covered event which falls within [the Policy] because of the mold and mold event exclusion." Defendants further admit that the coverage opinion provided by EDWARDS to SHAND on or about February 9, 2006, concluded, in part, that "no defense is due, given that the mold and mold event exclusion bar coverage for the Rogers Action." Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 20 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

21. Defendants admit that SHAND concurred with EDWARDS' February 9, 2006 opinion that there was no coverage applicable to the claims against the Insureds in the Rogers Action. Defendants admit that on or about February 24, 2006, EDWARDS, by and on behalf of PLAINTIFFS and with PLAINTIFFS' authorization, disclaimed any obligation by EVANSTON to provide coverage, a defense or indemnity for the Insureds in response to the Rogers Action. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 21 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

22. Defendants admit that on or about November 6, 2006, Kiss submitted a request to EDWARDS to "reimburse [Kiss'] defense costs forthwith and pay an indemnity settlement on [Kiss'] behalf." Defendants further admit that in his letter of November 6, 2006, Kiss stated that

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"SUMMIT was hired by the HOA as the project manager/construction manager on the Watermark reconstruction project during the time period of late 2001 to 2003" and that he further stated that "[i]n [Kiss'] capacity as a Project Manager/Construction Manager, [Kiss] performed tasks on the job including review of the structural and fire safing issues; removal and replacement of windows; removal and replacement of EIFS; removal and replacement of water damaged GYP board and approval of reimbursements made by the owners." Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 22 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

23. Defendants admit that in Kiss' letter of November 6, 2006, Kiss stated that as a result of the denial of the tender of defense, he had incurred legal fees and costs, that he believed his company may be exposed to a judgment in excess of $500,000 if the Rogers Action plaintiffs were successful at the time of trial, and that his company was required to defend and indemnify the Watermark HOA. Defendants also admit that, as part of his November 6, 2006 letter, Kiss provided EDWARDS with a copy of the Offer to Compromise in the amount of $50,000 that had been submitted by the plaintiffs in the Rogers Action, and that Kiss requested that "an indemnity settlement" be paid on his behalf. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 23 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

24. Defendants admit that in Kiss' letter of November 6, 2006, Kiss stated that "this denial has caused me great stress and anxiety" and "this case needs to be settled before my company is financially ruined." Defendants admit that Kiss also stated in his November 6, 2006 letter, that "the deposition of plaintiff's expert, Scott Morgan, indicates that plaintiff is claiming negligence on the party of Summit on matters having nothing to do with mold and [Kiss] would be happy to provide copies of Mr. Morgan's deposition and exhibits upon request." Defendants also admit that Kiss noted in his November 6, 2006 letter, that he would provide copies of the testimony of a real estate expert, and the supporting exhibits thereto, on the alleged diminution of value of the unit. Defendants are without sufficient knowledge or information to either admit or deny the

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remaining allegations contained in Paragraph 24 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

25. Defendants admit that on November 8, 2006, EDWARDS sent Kiss a letter requesting that Kiss provide EDWARDS "with the pages of Scott Morgan's deposition wherein plaintiff is claiming 'negligence on the part of Summit on matters having nothing to do with mold'" and that Kiss provide EDWARDS with the exhibits thereto. Defendants admit that Kiss sent EDWARDS over 300 pages of deposition testimony, and exhibits thereto, of Robert Morgan, taken on October 25, 2006. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 25 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

26. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 26 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

27. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 27 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

28. Defendants deny the allegation that there was an actual and/or potential conflict that was created by EDWARDS' representation of PLAINTIFFS and BYRON's representation of Szaras. Defendants deny the allegation that there was in fact a potential for coverage and that PLAINTIFFS had a duty to defendant Summit in the Rogers Action. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 28 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

29. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 29 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

30. Defendants admit that on November 21, 2006, EDWARDS sent a letter to SHAND which included, in part, that EDWARDS continued to believe "that the loss in question arose out

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of facts which fit Evanston's subject exclusion for 'mold' and 'mold event.'" Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 30 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

31. Defendants admit that, at all times relevant, BYRON was EDWARDS' co-shareholder. Defendants admit that BYRON was representing Szaras relative to the Rogers Action. Defendants deny the allegation that at no time prior to issuing the second coverage opinion did EDWARDS ever disclose to PLAINTIFFS that BYRON was representing Szaras relative to the Rogers Action. Defendants deny that there was a conflict of interest as a consequence of EDWARDS' representation of PLAINTIFFS and BYRON's representation of Szaras. Defendants admit that PLAINTIFFS authorized EDWARDS to proceed to issue another letter to Kiss denying coverage relative to the Rogers Action under the Policy. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 31 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

32. Defendants admit the allegations contained in Paragraph 32 of Plaintiffs' Complaint.

33. Defendants deny the allegation that it was not until after the settlement of the Rogers Action and the issuance of the second coverage opinion that PLAINTIFFS became aware of the fact that while EDWARDS was representing PLAINTIFFS, and providing coverage advice to PLAINTIFFS relative to the Rogers Action, BYRON was representing Szaras, a defendant in the Rogers Action. Defendants deny the allegation that they tried to keep from PLAINTIFFS the fact that while EDWARDS was representing PLAINTIFFS, and providing coverage advice to PLAINTIFFS relative to the Rogers Action, BYRON was representing Szaras, a defendant in the Rogers Action. Defendants admit that there was no conflict of interest posed by the fact that while EDWARDS was representing PLAINTIFFS, and providing coverage advice to PLAINTIFFS relative to the Rogers Action, BYRON was representing Szaras, a defendant in the Rogers Action. Defendants are without sufficient knowledge or information to either admit or deny the remaining

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allegations contained in Paragraph 33 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

34. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 34 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

35. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 35 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

36. Defendants deny the allegation that PLAINTIFFS incurred any costs or attorneys' fees defending the Summit Action as a consequence of any acts or conduct of Defendants. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in Paragraph 36 of Plaintiffs' Complaint and therefore Defendants deny them and leave Plaintiffs to their proofs.

FIRST CAUSE OF ACTION FOR PROFESSIONAL NEGLIGENCE

(By PLAINTIFFS Against all Defendants)

37. Defendants hereby incorporate by reference each and every response set forth in Paragraphs 1 through 36 above, as though fully set forth herein.

38. Defendants admit that EDWARDS provided legal advice and counsel to PLAINTIFFS in connection with the issue of whether coverage existed for the Insureds for the Rogers Action under the Policy. Defendants admit that, to the extent they had an attorney-client relationship with PLAINTIFFS, they owed PLAINTIFFS a duty to conform to the applicable standard of care and owed PLAINTIFFS a fiduciary duty. Defendants deny the remaining allegations contained in Paragraph 38 of Plaintiffs' Complaint.

39. Defendants admit that, to the extent they had an attorney-client relationship with PLAINTIFFS, they owed PLAINTIFFS a duty to conform to the applicable standard of care and a fiduciary duty. Defendants deny the remaining allegations contained in Paragraph 39 of Plaintiffs' Complaint.

40. Defendants deny the allegations contained in Paragraph 40 of Plaintiffs' Complaint.

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SECOND CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

(By PLAINTIFFS Against all Defendants)

41. Defendants hereby incorporate by reference each and every response set forth in Paragraphs 1 through 40 above, as though fully set forth herein.

42. Defendants admit that EDWARDS provided legal advice and counsel to PLAINTIFFS in connection with the issue of whether coverage existed for the Insureds for the Rogers Action under the Policy. Defendants admit that, to the extent they had an attorney-client relationship with PLAINTIFFS, they owed PLAINTIFFS a duty to conform with the standard of care and a fiduciary duty. Defendants deny the remaining allegations contained in Paragraph 42 of Plaintiffs' Complaint.

43. Defendants admit that at all times relevant, BYRON and EDWARDS were co-shareholders, and that they were agents and employees of BEM or B&E. Defendants deny that BYRON had an attorney-client relationship with PLAINTIFFS and therefore denies that BYRON owed PLAINTIFFS any duties. Defendants deny the remaining allegations contained in Paragraph 43 of Plaintiffs' Complaint.

44. Defendants deny that BYRON had an attorney-client relationship with PLAINTIFFS and therefore denies that BYRON owed PLAINTIFFS any duties. Defendants deny the remaining allegations contained in Paragraph 44 of Plaintiffs' Complaint.

45. Defendants deny the allegations contained in Paragraph 45 of Plaintiffs' Complaint.

46. Defendants deny the allegations contained in Paragraph 46 of Plaintiffs' Complaint.

47. Defendants deny the allegations contained in Paragraph 47 of Plaintiffs' Complaint.

48. Defendants deny the allegations contained in Paragraph 48 of Plaintiffs' Complaint.

WHEREFORE, Defendants seek relief as set forth in the Prayer below.

AFFIRMATIVE DEFENSES

Defendants BYRON & EDWARDS, APC, BYRON EDWARDS MOSTOFI, APC, and MICHAEL M. EDWARDS (hereinafter "Defendants") hereby set forth the following affirmative defenses as to each and every alleged cause of action contained in Plaintiffs' Complaint:

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FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

1. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' Complaint and each cause of action contained therein fails to state facts sufficient to constitute a cause or causes of action against these answering Defendants.

SECOND AFFIRMATIVE DEFENSE

(Comparative Negligence)

2. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that any and all events and happenings in connection with the allegations contained in Plaintiffs' Complaint, and the resulting injuries and damages, if any, referred to therein, were proximately caused and contributed to by the negligence of Plaintiffs in that Plaintiffs did not exercise ordinary care or reasonable care in their own behalf at the time and place referred to. Any losses and damages alleged or sustained by Plaintiffs were proximately caused by Plaintiffs' own negligence and should, therefore, be reduced by the amount of fault attributable to Plaintiffs.

THIRD AFFIRMATIVE DEFENSE

(Lack of Causation)

3. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that the conduct of these answering Defendants was not the proximate or legal cause of any damages allegedly suffered by Plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

4. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs have failed, neglected and refused to mitigate their damages, if any, and are thus barred from compensation for losses which could have been prevented by reasonable efforts on the part of Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

5. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that said Complaint and each and every cause of action contained therein, is barred by the applicable statutes of limitations.

SIXTH AFFIRMATIVE DEFENSE

(Laches)

6. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' recovery herein is limited or barred under the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

(Offset)

7. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that pursuant to Civil Code Section 1431.2, *et seq.*, that if said Defendants are held liable for damages to Plaintiffs, or any other party, in any amount, then said Defendants are only severally liable in an amount equal to their proportional share of liability for any non-economic damages allegedly suffered by the Plaintiffs.

EIGHTH AFFIRMATIVE DEFENSE

(Waiver)

8. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' recovery herein is limited or barred under the doctrine of waiver.

NINTH AFFIRMATIVE DEFENSE

(Consent)

9. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs consented to the acts and conduct of these answering Defendants upon which the Complaint is based.

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TENTH AFFIRMATIVE DEFENSE

(Release)

10. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that any liability of Defendant as alleged in the Complaint has been extinguished and released.

ELEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

11. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' recovery herein is limited or barred under the doctrine of estoppel.

TWELFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

12. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs are barred and precluded from recovery in this action under the doctrine of unclean hands.

THIRTEENTH AFFIRMATIVE DEFENSE

(Justification)

13. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that the acts and conduct of these answering Defendants upon which the Complaint is based were justified.

FOURTEENTH AFFIRMATIVE DEFENSE

(Supervening Causes)

14. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that any and all alleged events, happenings, resulting injuries and damages, if any, were proximately caused by the acts or conduct of Plaintiffs and/or by other or unknown third parties over whom these Defendants had no control, which acts or conduct were intervening and superseding causes of the injuries and damages, if any, which Plaintiffs' claim, thus barring Plaintiffs from any recovery against these answering Defendants.

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FIFTEENTH AFFIRMATIVE DEFENSE

(Lack of Reliance)

15. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs did not rely or reasonably rely on any information provided by Defendants or rely on Defendants to provide any information to Plaintiffs.

SIXTEENTH AFFIRMATIVE DEFENSE

(Lack of Duty)

16. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants deny that they owed a duty to Plaintiffs.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Lack of Attorney-Client Relationship)

17. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants deny that they had an attorney-client relationship with the Plaintiffs at the time Plaintiffs allegedly suffered damages.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Doctrine of Res Judicata/Collateral Estoppel)

18. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' Complaint, and each cause of action and damage claim alleged therein, is barred by the doctrines of res judicata and/or collateral estoppel.

NINETEENTH AFFIRMATIVE DEFENSE

(Privilege, Justification, Fairness, Reasonableness, and Good Faith)

19. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that the acts and conduct of these Defendants at all relevant times were privileged, justified, fair, reasonable under the given circumstances and taken in good faith.

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TWENTIETH AFFIRMATIVE DEFENSE

(Assumption of Risk)

20. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that any and all alleged events, happenings, resulting injuries and damages, if any, were caused by or arose out of risks of which Plaintiffs had full knowledge and which the Plaintiffs assumed.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Failure to Join A Necessary Party)

21. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' Complaint should be barred for failure to join an indispensable or necessary party.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Doctrine of Equitable Estoppel)

22. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' Complaint, and each cause of action and damage claim alleged therein, is barred by the doctrine of equitable estoppel.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Accord and Satisfaction)

23. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs are barred from recovery for each cause of action and damage claim alleged in their Complaint, pursuant to the doctrine of accord and satisfaction.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Negligence of Successor Counsel)

24. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Plaintiffs' alleged damages, if any, were caused in whole or in part by the negligence of others, including Plaintiffs' successor counsel.

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TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Set-Off)

25. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that to the extent Defendants are liable for any of Plaintiffs' alleged damages, they are entitled to a set-off in the amount obtained by Plaintiffs from any other parties in relation to the allegations set forth in the Complaint.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Full Performance and Discharge)

26. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Defendants performed and fully discharged any and all legal duties and obligations arising out of the matters alleged in the Complaint.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Apportionment)

27. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that any and all damages as alleged in the Complaint, if any, were proximately caused by the joint and several negligence of Plaintiffs and other named or unnamed defendants, their agents, employees or representatives. Accordingly, liability or damages must be apportioned among all the responsible parties.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Fails to State a Claim for Punitive Damages)

28. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that the Complaint fails to set forth facts sufficient to constitute a claim for punitive damages against Defendants.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Lack of Malice)

29. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that any and all of Defendants' actions were not

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taken maliciously, but, rather, were taken in good faith and upon a reasonable belief that the actions taken were proper under the circumstances.

THIRTIETH AFFIRMATIVE DEFENSE

(Insufficient Knowledge Re: Additional Defenses)

30. As a distinct, separate and further affirmative defense to Plaintiffs' Complaint on file herein, these answering Defendants allege that Defendants presently have insufficient knowledge or information upon which to form a belief as to whether they may have additional defenses available. Defendants reserve the right to assert additional affirmative defenses in the event discovery or further analysis indicate that additional, but presently unknown or unstated, affirmative defenses would be applicable.

PRAYER

WHEREFORE, Defendants BYRON & EDWARDS, APC, BYRON EDWARDS MOSTOFI, APC, and MICHAEL M. EDWARDS pray for judgment against Plaintiffs EVANSTON INSURANCE CO. and MARKEL SHAND, INC. ("PLAINTIFFS"), as follows:

A. Dismissing PLAINTIFFS' claims against Defendants with prejudice;

B. For attorneys' fees, and costs and expenses of suit; and

C. For such other relief as the Court deems equitable and just.

JURY DEMAND

Defendants BYRON & EDWARDS, APC, BYRON EDWARDS MOSTOFI, APC, and MICHAEL M. EDWARDS hereby demand a trial by jury on all issues alleged in PLAINTIFFS' Complaint so triable.

Dated: April 22, 2008

BUTZ DUNN & DESANTIS
A Professional Corporation

By: ______________________
Kevin V. DeSantis
James A. McFaul
Attorneys for Defendants
BYRON & EDWARDS, APC; BYRON EDWARDS MOSTOFI, APC; MICHAEL M. EDWARDS; THOMAS W. BYRON

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PROOF OF SERVICE

EVANSTON INS. CO. v. BYRON & EDWARDS, et al.
United States District Court, Southern District Case No. 08-CV-407 BTM (LSP)
Judge: Hon. Barry Ted Moskowitz

I, Mary Carpinelli, declare as follows:

I am employed by the law firm of Butz Dunn & DeSantis, whose address is 101 West Broadway, Suite 1700, San Diego, California 92101- I am over the age of eighteen years, and am not a party to this action.

ANSWER OF DEFENDANTS BYRON & EDWARDS, APC, BYRON EDWARDS MOSTOFI, APC AND MICHAEL M. EDWARDS TO COMPLAINT FOR LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTY

Electronic Mail Notice List

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Manual Notice List

The following is the list of attorneys who are not on the list to receive e-mail notices for this case (who therefore require manual noticing).

I declare that I am employed in the office at whose direction the service was made.

Executed at San Diego, California on April 22, 2008.

Mary Carpinelli (mcarpinelli@butzdunn.com)

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